

District of Columbia  
Office of the State Superintendent of Education  
Office of Review and Compliance  
Student Hearing Office

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**Confidential**

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STUDENT HEARING OFFICE  
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<p>STUDENT<sup>1</sup>, by and through his Parent</p> <p>Petitioners,</p> <p>v.</p> <p>DCPS</p> <p>Respondent.</p> <p>Case</p>	<p>HEARING OFFICER'S DETERMINATION</p> <p>Hearing Date: April 10, 2009</p> <p><u>Representatives:</u></p> <p>Counsel for Petitioners: Miguel Hull, Esq. 1220 L Street NW Suite 700 Washington, DC 20005</p> <p>Counsel for DCPS: Tanya Chor, Esq. Office of General Counsel 825 North Capitol St. NE Washington, DC 20002</p> <p><u>Hearing Officer:</u> <u>Coles B. Ruff, Esq.</u></p>
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<sup>1</sup> Personally identifiable information is attached as Appendices A & B to this decision and must be removed prior to public distribution.

## **JURISDICTION:**

The hearing was conducted and this decision was written pursuant to the *Individuals with Disabilities Act* (I.D.E.A.), P.L. 101-476, as amended by P.L. 105-17 and the *Individuals with Disabilities Education Improvement Act of 2004* (I.D.E.I.A.), District of Columbia Code, Title 38 Subtitle VII, and the District of Columbia Municipal Regulations, Title 5 Chapters 25 and 30 revised.

## **PROCEDURAL BACKGROUND:**

A Due Process Hearing was convened April 10, 2009, at the Van Ness School, 1150 5<sup>th</sup> Street, SE, Washington, DC 20003. The hearing was held pursuant to a due process complaint submitted by the counsel for the parent and student filed on March 6, 2009, alleging the issues outlined below.

## **RELEVANT EVIDENCE CONSIDERED:**

The Hearing Officer considered the representations made on the record by each counsel which may have resulted in stipulation of fact if noted, the testimony of the witness(es) and the documents submitted in the parties' disclosures (Petitioner's Exhibits DR-1 - DR-10 and DCPS Exhibits 1-7 which were admitted into the record.

## **ISSUE(S):** <sup>2</sup>

1. Did DCPS deny the student a free and appropriate public education by failing to develop an appropriate individualized education program for the student? <sup>3</sup>
2. Did DCPS deny the student a free and appropriate public education by failing to comprehensively evaluate the student?<sup>4</sup>

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<sup>2</sup> The alleged violation(s) and/or issue(s) raised in the complaint may or may/not directly correspond to the issue(s) outlined here. However, the issue(s) listed here were reviewed during the hearing and clarified and agreed to by the parties as the issue(s) to be adjudicated. Any other issue(s) raised in the complaint was withdrawn. Petitioner's withdrew some of the claims as a result of a March 30, 2009, MDT meeting. Petitioner is not now seeking a change in the student's disability classification.

<sup>3</sup> Specifically, Petitioner alleges the student should have a dedicated as a part of his educational program, the student should have seven hours per week of specialized instruction in a resource room and 7 hours per week of specialized instruction in the general education classroom.

<sup>4</sup> Petitioner is seeking a neurological evaluation and no longer is seeking a neuropsychological as DCPS has provided Petitioner an authorization for an independent neuropsychological evaluation (DCPS Exhibit 16). Also Petitioner agreed that if DCPS has conducted a vision and hearing screening within the last three months and provided them to Petitioner the claim for those evaluations were not adjudicated but DCPS' production requirement is included in the relief section.

## FINDINGS OF FACT <sup>5</sup>:

1. The student is \_\_\_\_\_ years old, currently attends School A and resides in the District of Columbia. The student is currently eligible to receive special education and its related services with a disability classification of Other Health Impairment (OHI). (Petitioner's Exhibit 18)
2. The student Individualized Education Program (IEP) at the time the due process complaint was filed was developed November 24, 2008. That IEP prescribed the following weekly services: five hours of specialized instruction per week in the general education setting; four hours of specialized instruction per week in the special education setting; thirty minutes of speech and language therapy per week in the general education setting; thirty minutes of speech and language therapy per week in the special education setting; thirty minutes of behavior support services per week in the general education setting; and thirty minutes of behavior support services per week in the special education setting. (DCPS Exhibit 7)
3. The student was initially referred for speech and language and psychological assessments in January 2008, because of concerns regarding speech and language development and behavior issues such as aggressiveness and temper tantrums. (Petitioner's Exhibit 8)
4. A clinical psychological evaluation was conducted of the student by DCPS on September 18, 2008. An independent comprehensive psychological evaluation was conducted of the student on November 11, 2008. (Petitioner's Exhibit 8 & 9)
5. The clinical-psychological evaluation found, among other things, general verbal abilities in the borderline range and impulsivity and inattentiveness causing him to be overly aggressive at times, but did not find that the student met the criteria for a disability classification of Emotional Disturbance (ED). (Petitioner's Exhibit 8)
6. A comprehensive psychological assessment dated November 11, 2008, found among other things, pervasive developmental disorder with autistic features. The report also found that the student has problems in the classroom related to inattention, hyperactivity, anxiety, behavioral outbursts, and communication. The report recommends full-time aide to assist the student in the classroom and also recommends several additional assessments including: a neurological, neuropsychological, occupational therapy ophthalmological and audiological and functional behavioral assessment. The report also recommended that the student be classified as Other Health Impaired ("OHI"). The independent clinical-psychological assessment recommended both a neuropsychological evaluation and a neurological

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<sup>5</sup> The evidence that is the source of the finding of fact is noted within a parenthesis following the finding. The parties in some instances may have submitted some of the same documents in each of their disclosures. If so, the Hearing Officer may have only cited one party's exhibit rather than both simply out of administrative efficiency.

evaluation to “explore neuropsychological factors that may be contributing to the student’s academic difficulties.” (Petitioner’s Exhibit 9)

7. DCPS completed an occupational therapy assessment on December 1, 2008, and completed a functional behavioral assessment on November 24, 2008. (Petitioner’s Exhibit 1&12)
8. An addendum to the comprehensive psychological evaluation was prepared January 30, 2009, reporting the results of additional assessments conducted to further determine the cause of the student’s classroom behavior and to assess whether the student was autistic or in the autism spectrum. The evaluator concluded the assessments suggested a “Higher probability levels of an Asperger’s Disorder classification; also an individual with high functioning Autistic-like symptoms.”
9. Petitioner filed the due process complaint March 6, 2009. On March 30, 2009, DCPS convened a resolution/multidisciplinary team (MDT) meeting. The MDT reviewed the student’s evaluations and considered Petitioner’s requests for relief. (Petitioner’s Exhibit 1, DCPS Exhibit 15)
10. The student’s educational advocate recently observed the student in his current classroom. The student behavior was significantly disruptive and the student was engaged in throwing objects at other students and putting himself and other student’s in danger. The student did not display this disruption when working one to one with the teacher. Consequently, the advocate requested the student be provided a dedicated aide to assist with his behavior. testimony, Petitioner’s Exhibits 14 & 15)
11. At the March 30, 2009, meeting the MDT agreed to authorize an independent neuropsychological evaluation. The DCPS members of the team desired to wait until the neuropsychological evaluation was completed prior to conducting the recommended neurological evaluation. Although the parent through her advocate requested the student’s weekly hours of specialized instruction be increased from a total of 10 hours the DCPS members of the team agreed to maintain the 10 hours of instruction.<sup>6</sup> The MDT also agreed that the special education coordinator would “work on request for a dedicated aide.” The IEP, although amended as a result of this meeting, was not amended to include a dedicated aide. (Petitioner’s Exhibit 18, DCPS Exhibit 15)
12. The student is making academic progress in his current classroom. With a dedicated aide the student would be able to access the curriculum in the general education setting and not need additional specialized instruction in a more restrictive setting. testimony)

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<sup>6</sup> The advocate requested more specialized instruction during the MDT meeting and reduced the request at the due process hearing to 7 hours in resource and 7 hours in general education setting.

## CONCLUSIONS OF LAW:

Pursuant to IDEIA §1415 (f)(3)(E)(i) a decision made by a hearing officer shall be made on substantive grounds based on a determination of whether the child received a free appropriate public education (FAPE).

Pursuant to IDEIA §1415 (f)(3)(E)(ii) in matters alleging a procedural violation a hearing officer may find that a child did not receive FAPE only if the procedural inadequacies impeded the child's right to FAPE, significantly impeded the parent's opportunity to participate in the decision making process regarding provision of FAPE, or caused the child a deprivation of educational benefits.

Pursuant to 5 DCMR 3030.3 the burden of proof is the responsibility of the party seeking relief.<sup>7</sup> In this case the student/parent is seeking relief and has the burden of proof that the action and /or inaction or proposed placement is inadequate or adequate to provide the student with FAPE.

1. Did DCPS deny the student a free and appropriate public education by failing to develop an appropriate individualized education program for the student? Conclusion: Petitioner's counsel sustained the burden of proof by a preponderance of the evidence.

A free appropriate public education ("FAPE") consists of special education and related services that are provided in conformity with the student's IEP, which in turn is to be developed according to a student's unique educational needs 34 C.F.R. § 300-17; Board of Education of the Hendrick Hudson Central School District. V. Rowley, 458 U.S. 276, 182 (1982) ("The free appropriate public education required by the Act is tailored to the unique needs of the handicapped child by means of an Individualized Educational Program ("IEP")).

The term "special education means specially designed instruction, at no cost to the parents, to meet the unique needs of a child with a disability[...]" 34 C.F.R. §300.39. A dedicated aide is a related service if necessary for student to access education. 34 C.F.R. § 300.34.

There was sufficient evidence presented of the student's disruptive behaviors in the classroom that are putting the student and his classroom peers at risk. The MDT at the March 30, 2009, MDT meeting agreed that a dedicated aide would be obtained. However, the student's IEP was not amended to include the dedicated aide despite the evidence and agreement that a dedicated aide was required. The Hearing Officer concludes the failure to amend the IEP and provide the student the dedicated aide is a denial of a free and appropriate public education.

There was insufficient evidence presented that the student should be provided the four additional hours of specialized instruction per week. The Hearing Officer did not find the educational advocate's testimony credible with regard to the additional specialized instruction. She simply and generally stated the student would benefit from the additional instruction. However, it was

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<sup>7</sup> Based solely upon the evidence presented at the hearing, an impartial hearing officer shall determine whether the party seeking relief presented sufficient evidence to meet the burden of proof that the action and /or inaction or proposed placement is inadequate or adequate to provide the student with FAPE.

not clear from the testimony whether the student would be as able to gain educational benefit in the general education setting with the current number of hours of specialized instruction and the addition of the dedicated aide. The Hearing Officer was not convinced there was a denial of FAPE to the student in this regard.

Although, Petitioner asserted the student was in need of 55 hours of tutoring for the lack of a dedicated aide from the time the request for an aide was made in November 2008, the Hearing Officer was not convinced by the advocate's testimony that the student had lost instruction and/or services by not having the dedicated aide. Therefore, the Hearing Officer concludes the student is not entitled to any compensatory educational for the lack of the dedicated aide prior to the March 30, 2009, MDT meeting.

2. Did DCPS deny the student a free and appropriate public education by failing to comprehensively evaluate the student? Conclusion: Petitioner's counsel did not sustain the burden of proof by a preponderance of the evidence.

A public agency must ensure that the student being evaluated is assessed in all areas of suspected disability and that the evaluation is sufficiently comprehensive to identify all of the student's special education needs, and that the evaluation includes all assessment tools that may assist in determining the content of the IEP. 34 C.F.R. Sec. 300.304

DCPS conducted all the recommended evaluations and granted an independent evaluation save the neurological evaluation. The independent clinical-psychological assessment recommended both a neuropsychological evaluation and a neurological evaluation to "explore neuropsychological factors that may be contributing to the student's academic difficulties." DCPS has offered to consider the need for a neurological evaluation following the neuropsychological evaluation being conducted and provided.

The Hearing Officer did not find the advocate's testimony regarding the need for a neurological evaluation credible. She did not have medical or psychological expertise to offer such an opinion. Given that the evaluation that recommended the evaluations did not sufficiently distinguish the evaluations and grouped them together to assess "neuropsychological factors" it is not unreasonable to first conduct the neuropsychological and then a MDT to determine if the neurological evaluation is necessary. Therefore, the Hearing Officer does not conclude there is yet a denial of FAPE in this regard.

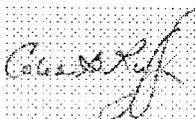
**ORDER:**

1. DCPS shall, within thirty calendar days of the issuance of this Order, provide the student a full time dedicated aide.
2. Petitioner shall promptly obtain the independent neuropsychological evaluation and provide a copy of the evaluation to DCPS.

3. DCPS shall, within fifteen (15) business days of the issuance of this Order, provide Petitioner the vision and hearing screenings for the student conducted within the past six months.
4. DCPS shall, within fifteen (15) business days of its receipt of the independent neuropsychological evaluation, convene a multidisciplinary team (MDT) meeting to review the student's independent neuropsychological evaluation, determine if additional evaluations are necessary including a neurological evaluation and review and revise the student's IEP as appropriate.
5. DCPS will be given a day for a day extension of any of the prescribed time frames in this Order for any delay caused by the student, the parent(s) and/or their representative(s).

**APPEAL PROCESS:**

The decision issued by the Hearing Officer is final, except that any party aggrieved by the findings and decision of the Hearing Officer shall have 90 days from the date of the decision of the Hearing Officer to file a civil action with respect to the issues presented at the due process hearing in a District Court of the United States or a District of Columbia court of competent jurisdiction, as provided in 20 U.S.C. § 415(i)(2).



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**Coles B. Ruff, Esq.**  
**Hearing Officer**  
**Date: April 20, 2009**